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Supreme Court, U.S.
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No. 08-335

IN THE

# Supreme Court of the United States

MICHAEL B. DURAND,

*Petitioner,*

*v.*

CITY OF PHOENIX,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF IN OPPOSITION

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## COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether the Ninth Circuit Court of Appeals correctly dismissed a claim under the Americans with Disabilities Act because the charge of disability discrimination and retaliation was filed with the EEOC more than 180 days after Petitioner's termination, and there was no evidence of a filing with a State or local agency with authority to investigate and remedy the alleged unlawful employment practices?

2. Whether the Ninth Circuit Court of Appeals should have ruled on the merits of Petitioner's state law intentional infliction of emotional distress claim? Whether this issue should be considered because it was raised for the first time in the Petition for Writ of Certiorari?

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## STATEMENT OF THE CASE

The Statement of the Case presented by Petitioner Michael Durand ("Petitioner") does not accurately describe the proceedings below. Also, it is filled with a myriad of purported facts and references to evidence not presented in the District Court nor considered by the Ninth Circuit Court of Appeals.

### A. Proceedings

Petitioner filed this action on November 9, 2004 in the United States District Court for the District of Arizona. On December 1, 2004, the City filed its answer. After the parties made disclosures and engaged in discovery, on January 6, 2006 the City moved for summary judgment and filed its separate statement of facts. The City argued that the state law intentional infliction of emotional distress claim was time barred because Petitioner had not filed a timely notice of claim under Arizona law, and that the acts undertaken by the City were not extreme and outrageous conduct to support the claim. The City argued that Petitioner's federal ADA discrimination and retaliation claim were time barred for failure to file a timely charge with the EEOC. The City also argued that Petitioner did not have a disability under the ADA and that Petitioner was not discriminated or retaliated against due to any disability, but he was disciplined and terminated for his threats toward a co-employee and criminal conduct while on administrative assignment.

On June 8, 2006, Petitioner filed his response to the City's dispositive motion and a separate statement of facts. Although the statement of facts referenced a number of purported exhibits, none were attached to the pleading filed with the District Court. On June 23, 2006, the City filed its reply in support of its motion for summary judgment. The City also filed objections and a motion to strike inadmissible evidence referenced in Petitioner's statement of facts. Petitioner did not ever file a response to the City's objections and motion to strike. Petitioner did not ever file in the District Court the omitted exhibits referenced in Petitioner's statement of facts.

On July 24, 2006, oral argument was held before the Honorable Susan R. Bolton on the City's motion for summary judgment. Petitioner was represented at the hearing by attorney Robert Gregory, who represented Petitioner throughout the lower court proceedings. At the hearing, the trial court announced that she was granting the City's motion for summary judgment addressed to Petitioner's state law claim for intentional infliction of emotional distress. After initially taking under advisement the dispositive motion addressed to Petitioner's federal disability discrimination and retaliation claims, on July 25, 2006 the trial court judge granted summary judgment in favor of the City on those remaining federal claims. The trial court stated:

> The statute is clear that Plaintiff had 180 days to file his charge with the EEOC unless he first filed a charge with the appropriate state agency. Plaintiff presented no evidence that he filed a charge with a state agency. . .

> Plaintiff's counsel agreed at oral argument that if the 180 days is the relevant deadline, then all of Plaintiff's federal claims are barred.

(Petition Appdx. 8)

On July 25, 2006, final judgment dismissing the action was entered in favor of the City. On August 23, 2006, Petitioner, acting pro per, timely filed a notice of appeal. By Memorandum Decision issued March 25, 2008, the Ninth Circuit Court of Appeals affirmed the judgement. On the federal claims, the Ninth Circuit Court of Appeals held: "The district court properly concluded that Durand's discrimination claims were time-barred because Durand filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") in July 2004, more than 180 days after the termination in early December 2003." (Petition Appdx. 2) The district court's grant of summary judgment on the state law claim was affirmed because the acts alleged "were not sufficiently extreme and outrageous to state a claim for relief for intentional infliction of emotional distress." (Petition Appdx. 2) On May 12, 2008, Petitioner's petition for panel rehearing before the Ninth Circuit Court of Appeals was denied. (Petition Appdx. 11)

## B. Facts

The following were the undisputed facts presented to the District Court and which were considered by the Ninth Circuit Court of Appeals:

Beginning on March 20, 2000, Petitioner was employed by the Respondent City of Phoenix ("City") as a Landfill Equipment Operator with the Department of Public Works. On February 15, 2003, Petitioner, while working at the Skunk Creek Landfill, had a problem with the foreman, Gilbert Quintana. As a result of the problem, Petitioner left work without obtaining approval. An investigation of the February 15, 2003 incident was undertaken. On April 4, 2003, based upon the investigation, Petitioner received a written reprimand for his February 15, 2003 conduct. In May 2003, after Petitioner's grievance was denied at two levels, Petitioner chose not to appeal the grievance to the remaining two levels available to him.

On September 8, 2003, Petitioner went to work and was involved in an altercation with Jim Mathis, another employee at the Skunk Creek landfill. Petitioner was so upset from the incident with Mathis and how he felt he was being treated, that on September 9, 2003 Petitioner voluntarily hospitalized himself for a few days.

By notice effective on September 11, 2003, Petitioner was placed on paid administrative leave while the City investigated the September 8, 2003 incident between Petitioner and Mathis. While on administrative leave, Petitioner was assigned to be at his house during normal working hours. An assignment to administrative leave, with home assignment, pending an investigation is not uncommon.

On October 23, 2003, based upon an investigation of the September 8, 2003 incident and having received information from the Phoenix Police Department about Petitioner engaging in allegedly criminal behavior while on City time, a recommendation was made to Director Mark Leonard that Petitioner be terminated. On October 28, 2003, the City notified Petitioner that a pre-termination meeting was to be held on November 6, 2003 to allow Petitioner an opportunity to provide information and speak with Director Leonard. When Petitioner objected to the timing of the meeting, the meeting was re-scheduled for November 10, 2003. However, Petitioner was arrested and was unable to make the November 10, 2003 meeting. On November 10, 2003, the City notified Petitioner that the pre-termination meeting was rescheduled a second time for November 18, 2003.

On November 17, 2003, the City was notified that Petitioner was unable to attend the pre-termination meeting scheduled for November 18, 2003 because Petitioner was still in jail. The City then notified Petitioner by letter, dated November 18, 2003, that he had until December 1, 2003 to submit in writing any information about the September 8, 2003 incident or the alleged inappropriate acts on City time. The letter was delivered to Petitioner in jail. Petitioner signed a document acknowledging receipt of the notice. On December 1, 2003, Durand submitted a written one sentence statement to the City wherein he denied all charges and requested a full hearing after December 10, 2003.

On December 10, 2003, Laura Neal signed the personnel form to terminate Petitioner's employment effective at the end of the day on December 12, 2003. Petitioner was terminated because the City believed he violated Personnel Rules in the September 8, 2003 confrontation with Mathis and, while on City time, Petitioner had on several occasions violated a court order.

On December 17, 2003, Petitioner filed an appeal of his termination to the Civil Service Board. On March 17, 2004, an evidentiary hearing on Petitioner's appeal of his termination was held before an impartial hearing officer. Petitioner was represented by attorney Dale Norris. The hearing officer's April 5, 2004 Hearing Report recites the evidence adduced at the hearing and concluded:

> The greater weight of the credible evidence established that Michael Durand threatened Mathis twice, with words and physical gestures, on September 8, 2003. This conduct violated Personnel Rules 21b2, 21b3 and 21b7, as well as Administrative Regulation 2.325. . . . [and] the only reasonable action on the City's part is to dismiss Durand.

On April 19, 2004, after notice was given to Petitioner, the Civil Service Board considered Petitioner's appeal and the Hearing Report. The Civil Service Board "found that the employee did violate Personnel Rules 21b2, 21b3, and 21b7", but the Board "ordered that the termination be reduced to a 240-hour suspension without back pay."

On July 19, 2004, Petitioner filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination by the City based upon age, disability and retaliation. The Complaint attached as Exhibit B a copy of the August 17, 2004 Dismissal and Notice of Rights from the EEOC which indicated the EEOC was closing its file on Petitioner's charge of discrimination because "[w]e cannot investigate your charge because it was not filed within the time limit required by law."

On July 29, 2004, Petitioner served a written notice of claim upon the City which purported to comply with A.R.S. § 12-821.01, the Arizona notice of claims statute.

## REASONS FOR DENYING THE PETITION

The Petition for Certiorari ("Petition") should be denied. There is no compelling reason for this Court to grant certiorari in this case. The Petition fails to demonstrate any conflict with the holdings of other Circuit Courts or this Court. The Ninth Circuit Court of Appeals correctly stated and applied the statutory provisions relating to the timely filing of charges of Americans with Disability Act ("ADA") discrimination and retaliation claims with the EEOC. On appeal to the Ninth Circuit Court of Appeals, Petitioner attempted to raise new arguments and referenced new evidence which were not presented to the District Court, and which were properly ignored by the Ninth Circuit Court of Appeals. Petitioner continues in his Petition to improperly advance new arguments and reference new evidence which were not part of the proceedings in the lower courts.

## I. Petitioner Offers No Compelling Reason For The Grant Of Certiorari Regarding The Dismissal Of The ADA Claims

In the Petition, Petitioner posits the issue as whether this Court will recognize and adjudicate in this Court a cause of action for retaliation based upon arguments presented in the lower courts. Simply put, such a position is preposterous! Buried beneath the convoluted presentation in the Petition is the true issue of whether the Ninth Circuit Court of Appeals properly analyzed the timeliness of Petitioner's filing of his charge of discrimination. The Ninth Circuit Court of Appeals, and the District Court before it, both correctly analyzed the law, and the evidence properly before them led them to conclude Petitioner failed to timely file his charge of discrimination.

A person with a claim under the ADA must timely pursue an administrative remedy with the EEOC before they can file suit. 42 U.S.C. § 12117(a) (Petition Appdx. 18). In order to be timely, the claimant must file a discrimination charge with the EEOC within 180 days after the alleged violation. 42 U.S.C. § 2000e-5(e)(1) (Petition Appdx. 22). If the claimant "initially instituted proceedings with a State or local agency with authority to grant or seek relief from such [unlawful employment] practice", then a claimant has up to 300 days after the alleged unlawful employment practice to file with the EEOC. *Id.*; *see also Edelman v. Lynchburg College*, 535 U.S. 106, 109 n.1 (2002).

The law on timeliness of ADA charges of discrimination was properly applied to the facts presented in the District Court and reviewed on appeal by the Ninth Circuit Court of Appeals. On July 19, 2004, more than 180 days after his December 12, 2003 termination, Petitioner filed a charge of discrimination with the EEOC alleging discrimination by the City based upon age, disability and retaliation leading up to his termination. No evidence was presented that a similar charge was filed with a State or local agency with authority over similar equal employment opportunity charges. While the Petition refers to a purported 2008 work sharing agreement(Petition Appdx. 42-55), such unauthenticated agreement was not presented in the District Court or to the Ninth Circuit Court of Appeals. Nor, more importantly, was there any evidence presented that in 2004 a similar work sharing agreement was in place. The Petition also appends a number of unauthenticated purported EEOC publications (Petition Appdx. 56-65) and notices (Petition Appdx. 66-67, 71-76, 79-80) which were not presented to the District Court and, therefore, were not considered by the Ninth Circuit Court of Appeals. The Ninth Circuit Court of Appeals understandably and correctly refused to consider Petitioner's new contentions and evidence submitted on appeal, and decided the case based upon the record from the District Court. (Petition Appdx. 2)

There is no good reason to grant certiorari here as to any question relating to the dismissal of the ADA claims due to untimely filing with the EEOC. The Ninth Circuit Court of Appeals properly analyzed the issue of the timeliness of the EEOC filing here. Based upon the

evidence before the District Court, the appellate court properly determined that the EEOC filing was untimely, thereby barring the ADA claims.

## II. Petitioner Raises For The First Time A New Argument Regarding His Dismissed State Law Claim And Offers No Compelling Reason For The Grant Of Certiorari Regarding The Dismissal Of The State Law Claim

In the Petition, Petitioner asserts that the lower courts improperly decided the state law claim for intentional infliction of emotional distress, and instead should have deferred decision on the merits of the state law claim to state courts after the federal claims had been dismissed. First, this argument was never raised in the District Court or before the Ninth Circuit Court of Appeals. This Court should not hear Petitioner's argument presented for the first time in the Petition.

Second, Petitioner offers no compelling reason for a grant of certiorari by this Court. No conflict with other decisions from this Court or other Circuit Courts have been asserted. Petitioner cites two prior Supreme Court cases, but only for the general proposition that a District Court has the power, if it chooses, to decline to decide pendent state law claims. Neither decision is impacted by the District Court's decision here to go forward to decide the state law claim. The District Court unquestionably had discretion as to whether to decide state law claims or to dismiss such claims without prejudice so they may be decided by a state court. *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613, 618 (2002); 28 U.S.C. § 1367(c)

(2004) (district courts "may decline to exercise supplemental jurisdiction over a claim if . . . the district court has dismissed all claims over which it has original jurisdiction".).

The entire premise of Petitioner's argument is also faulty since the state law claim here was decided before a decision was rendered as to the federal claims. On July 24, 2006, the District Court decided the state law claim in its ruling from the bench which was confirmed in a minute entry. The next day, the District Court issued its minute entry deciding the federal claims, and instructing the Clerk to enter the final order dismissing the entire action.

Third, the circumstances here fully justify ruling on the merits. Discovery had been completed, the motion for summary judgment was briefed as to both federal and state law claims, and the state law claims were decided before the dismissal of the federal claims. Petitioner also did not request that the District Court or the Ninth Circuit Court of Appeals abstain from deciding the merits, but only argued the merits of the state law claim.

The Petition also erroneously suggests that the state law claim for intentional infliction of emotional distress was not time barred. Only on July 29, 2004, more than 180 days after Petitioner's termination, did Petitioner serve a notice of claim on the City. The District Court actually held that Petitioner's claim for infliction of emotional distress was almost completely barred for failure to timely comply with Arizona's 180 day notice of claim statute, A.R.S. § 12-821.01(A).

Petitioner's counsel admitted as much to the District Court. The only tortious act which Petitioner's counsel suggested was not time barred was the purported offer in October 2004 of a Last Chance Agreement. The District Court held an offer of such an agreement was not actionable as extreme and outrageous conduct. No notice of claim under Arizona law was ever served in relation to the Last Chance Agreement (as it was purportedly offered months after Petitioner's July 29, 2004 notice of claim), so any claim would also have been barred under A.R.S. § 12-821.01(A). The purported Last Chance Agreement, although appended to the Petition (Petition Appdx. 77-78), was not actually presented to the District Court. When the Last Chance Agreement and Petitioner's 2005 EEOC Charge of Discrimination (Petition Appdx. 79-80) were offered for the first time on appeal to the Ninth Circuit Court of Appeals, they were understandably and correctly ignored in deciding the issues on appeal.

There is no good reason to grant certiorari here as to the proposed question relating to the dismissal of the state law claim. The issue presented by the Petition was not even raised before the Ninth Circuit Court of Appeals. Under the circumstances of this case, there also was nothing improper in the lower courts deciding the merits of the state law claims.

## CONCLUSION

The Petition for Certiorari should be denied. There is no compelling reason demonstrated for this Court to exercise its discretion to review the Memorandum Decision of the Ninth Circuit Court of Appeals in this case.

Respectfully submitted,

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# APPENDIX

## APPENDIX — ARIZONA REVISED STATUTE § 12-821.01

A. Persons who have claims against a public entity or a public employee shall file claims with the person or persons authorized to accept service for the public entity or public employee as set forth in the Arizona rules of civil procedure within one hundred eighty days after the cause of action accrues. The claim shall contain facts sufficient to permit the public entity or public employee to understand the basis upon which liability is claimed. The claim shall also contain a specific amount for which the claim can be settled and the facts supporting that amount. Any claim which is not filed within one hundred eighty days after the cause of action accrues is barred and no action may be maintained thereon.

B. For purposes of this section, a cause of action accrues when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition which caused or contributed to the damage.

C. Notwithstanding subsection A, any claim which must be submitted to a binding or nonbinding dispute resolution process or an administrative claims process or review process pursuant to a statute, ordinance, resolution, administrative or governmental

rule or regulation, or contractual term shall not accrue for the purposes of this section until all such procedures, processes or remedies have been exhausted. The time in which to give notice of a potential claim and to sue on the claim shall run from the date on which a final decision or notice of disposition is issued in an alternative dispute resolution procedure, administrative claim or review process. This provision shall not be construed to prevent the parties to any contract from agreeing to extend the time for filing such notice of claim.

D. Notwithstanding subsection A, a minor or an insane or incompetent person may file a claim within one hundred eighty days after the disability ceases.

E. A claim against a public entity or public employee filed pursuant to this section is deemed denied sixty days after the filing of the claim unless the claimant is advised of the denial in writing before the expiration of sixty days.

F. This section shall apply to all causes of action which accrue on or after the effective date of this section.